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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 846

JACK C. HUNTER, Mayor,
CITY OF YOUNGSTOWN, OHIO, et al.,
Petitioners,

vs.

FRATERNAL ORDER OF POLICE,
YOUNGSTOWN LODGE NO. 28, et al.,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Fraternal Order of Police, Youngstown Lodge No. 28 and Carmen Agnone hereby file their opposition to granting the writ of certiorari in the above-captioned matter.

The Opinions below and the basis of this Court's jurisdiction are set out at page 2 of the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional provisions set forth in the Petition at page 3, the following provision of the Ohio Constitution is also involved in this cause.

Article II, Section 28, to the Constitution of the State of Ohio provides:

> "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

QUESTIONS PRESENTED

1. Should the Supreme Court review the decisions of the Ohio State courts which prohibited the use of a local residency rule as a condition of employment for certain municipal employees when the municipality failed to assert any reasons or offer any evidence that the residency rule furthered an appropriate governmental interest or related to a legitimate state purpose.

2. Whether a determination by a state Appellate Court that a municipal residency rule is violative of a provision of the State Constitution should be reviewed by the United States Supreme Court on a writ of certiorari.

COUNTER-STATEMENT OF THE CASE

On January 20, 1972, the Youngstown Civil Service Commission enacted a rule whereby residency by a municipal employee beyond the Youngstown City limits would constitute grounds for termination of employment. The rule provides:

> "Any officer or employee not residing within the city limits of Youngstown, except as otherwise provided in Rule 4, Section 5 is subject to dismissal from the service of the City."

Among the municipal employees affected by the enactment of the residency rule was Carmen Agnone. In 1959, thirteen (13) years prior to the passage of the residency rule, Respondent Agnone moved from the City of Youngstown to an adjoining suburb. Upon the passage of the residency rule, Petitioner City terminated Mr. Agnone's employment.

This action was then instituted by Carmen Agnone to challenge the City's right to promulgate and enforce a residency requirement. The Fraternal Order of Police, Youngstown Lodge No. 28, representing the Youngstown police force, joined in this cause with Mr. Agnone.

At the hearing in this cause, the evidence established that Carmen Agnone was employed by the City of Youngstown at the Youngstown Municipal Airport. While the Airport is owned by the City, it is located outside the Youngstown City limits, approximately twelve (12) miles from downtown Youngstown. The evidence further reflected that Mr. Agnone's residence, in a suburb of Youngstown, was eight and one-half (8½) miles from the Airport. Consequently, Mr. Agnone was closer to his place of employment and better able to respond to an emergency, if any developed, than had he been a Youngstown resident. At trial the City of Youngstown did not introduce any evidence

in support of its residency rule. It further failed to state the purpose or purposes allegedly served by its rule. The City did not provide any reasons for the rule, and did not assert, much less demonstrate, a nexus between the residency requirement and efficient municipal service.

The Common Pleas Court of Mahoning County, Ohio, held that the validity of the residency rule was dependent upon an examination of the rights affected by the rules and the evidence introduced to demonstrate a valid reason for the requirement. The trial court noted that the rule did infringe on the basic and fundamental Constitutional right of travel. The trial court then observed an absence of any evidence or reason in support of the reasonableness of the rule, and concluded that the residency rule was constitutionally infirm, and could not be applied to any City employee. The Court, upon examining the controlling case law in Ohio, further held that, to apply the rule to civil service employees who joined the service prior to the date the rule was adopted, would be violative of the prohibition against retroactive laws found in Article II, Section 28 of the Ohio Constitution. The Court also expressed the view that such application would be contrary to Article I, Section 10 of the United States Constitution. Accordingly, the trial court held that the residency rule was unconstitutional and void.

An appeal was taken to the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio. The decision of the lower court was reversed in part, and affirmed in part.[1] The Court of Appeals refused to accept the argument that residency rules are per se unconstitutional. Rather, the Appeals Court decided that it would have to consider whether a legitimate governmental interest could be served by the residency rule.

In that light, the Court of Appeals considered the record. The Appellate Court took judicial notice of the functions and duties

[1] Petitioner inaccurately represents that the decision was affirmed on appeal.

of police officers, and concluded that such officers could properly be subject to a residency rule. However, with respect to Carmen Agnone, the Appellate Court affirmed the holding of the lower court. The Court of Appeals reasoned that since Mr. Agnone lived closer to his place of employment than if he lived in the City, application of the residency rule to Mr. Agnone would be patently unreasonable. In so holding, the Court again noted the City's failure to offer evidence or reasons in support of its rule.

Though holding that police officers are subject to the residency rule, the Appellate Court concluded that application of the rule to policemen hired prior to the effective date of the rule would constitute a retroactive application of the law. In so holding, the Appellate Court, consistent with existing Ohio decisional law, concluded that any retroactive application of the rule was incompatible with provisions of the Ohio Constitution. Accordingly, the Court sanctioned the prospective application of the residency rule.

Petitioner, City of Youngstown, sought review in the Supreme Court of Ohio. The Ohio Supreme Court dismissed the claimed appeal by right, denied the City's Motion to Certify the Record, and denied the City's Motion for Rehearing. Petitioner City of Youngstown now seeks review from this Supreme Court of the United States.

REASONS FOR DENYING THE WRIT

1. **The Ohio Courts' Resolution of the Fourteenth Amendment Challenge to the Youngstown Residency Rule Was Narrowly Limited to the Facts Presented, and the Case Does Not Present Significant Constitutional Questions or Issues of Widespread Importance.**

The instant case involves the propriety of the Youngstown residency rule as applied to Youngstown policemen and Carmen Agnone, a former municipal employee assigned to the Youngstown Airport. Petitioner represents that the decision below held that residency rules are violative of the Fourteenth Amendment to the United States Constitution. This is an inaccurate representation of the lower court's holding. The Seventh District Court of Appeals upheld the constitutionality of the rule as applied to Youngstown policemen. The Court of Appeals did hold that the residency rule could not be applied to Carmen Agnone. The Court's conclusion as to Agnone was based on the state of the record which established that his residency was nearer his place of employment than if he lived in Youngstown, and the total failure of the City to introduce any evidence to establish the reasonableness of the rule as applied to Mr. Agnone.

Clearly, despite the pretentions of the City, the Court of Appeals did not frame any broad prohibition on residency rules and did not construe the Fourteenth Amendment as precluding such rules. Indeed, the lower court recognized and upheld the authority of a municipality to enact a proper residency rule. However, upon the state of the record, Plaintiff Agnone was exempted from the operation of the rule. Since the holding below is limited to its peculiar facts, the case does not present a significant issue of widespread importance.

BLEED THROU

2. **The Resolution by the Ohio Appellate Court of the Fourteenth Amendment Challenge to the Youngstown Residency Rule Comports With Decisions by This Court.**

The Youngstown residency rule accords different treatment to individuals who live beyond the City limits. City residents are eligible for municipal employment, while those who reside elsewhere are declared ineligible for positions in the Youngstown Civil Service. Respondents challenged this classification on Equal Protection grounds. The lower courts examined the individual interests affected by the classification and the governmental interests served by the residency rule. Both the mode of review and the ultimate resolution were in conformance with prior decisions of this Court.

In *Weber v. Aetna Casualty and Surety Compnay,* 406 U.S. 164 (1972), this Court explained:

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Morey v. Doud, 354 US 457, 1 L Ed 2d 1485, 77 S Ct 1344 (1957); Williamson v Lee Optical Co., 348 US 483, 99 L Ed 563, 75 S Ct 461 (1955); Gulf, Colorado & Santa Fe R. Co. v Ellis, 165 US 150, 41 L Ed 666, 17 S Ct 255 (1897); Yick Wo v Hopkins, 118 US 356, 30 L Ed 220, 6 S Ct 1064 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. Brown v Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR 2d 1180 (1954); Harper v Virginia Board of Elections, 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079 (1966). The essential inquiry in all the foregoing cases is, how-

> ever, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" Id at 172, 173.

The lower court conscientiously examined these critical inquiries required by this Court.

With respect to the initial question, "what legitimate state interest does the classification promote?", the lower courts upon consideration of the record correctly acknowledged that the city did not establish any reasonable justification for its residency rule. The City did not explain the purposes served or the policies fostered by a residency requirement. In all Equal Protection cases a legislative classification will only be upheld if some legitimate state interest is established. Thus, as was observed by this Court in *Police Department v. Mosley*, 408 U.S. 92 (1972), at 95:

> "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."

In the instant case the City neither asserted nor established such an interest. No nexus between residency in the City and efficient government service was either alleged or demonstrated. The City let the courts devine the purpose of the rule. Yet, the court's function is not to guess legislative motive or speculate on the purpose of an enactment. In *McGinnis v. Royster*, 410 U.S. 263 (1973), this Court stated that, in applying the less exacting rational relation test, the court should "inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose." Id. at 270. No such purpose was articulated in the instant cause. In *Dunn v Blumstein*, 405 US 330 (1972), this Court advised consideration of "governmental interests asserted in support of the classification." Id. at 335. No such interest was asserted in the instant cause.

BLEED THROUGH

Despite the total failure of the City to provide adequate justification for the rule, the Court of Appeals did take judicial notice of possible governmental interests served by a residency rule applied to police forces. Given the nature of a policeman's duties, the Appellate Court concluded that there are possible governmental interests served by requiring residency of policemen. Still, with respect to Carmen Agnone, the Appellate Court was not able to conceive of any such purpose.

Thus, the Court did properly address the issue of whether a legitimate purpose was served. Indeed, in its treatment of the issue, and by its willingness to cure the evidentiary defects of Petitioner's case through judicial notice, the Court of Appeals extended to Petitioner City every possible consideration.

The Court of Appeals then directed itself to the second constitutional concern; whether fundamental personal rights were endangered by the residency rule. The Court of Appeals recognized that a residency rule does affect the right of an individual to travel. This Supreme Court has consistently emphasized the constitutional dimensions of this right and has proclaimed the right a fundamental one. See *Kent v. Dullis*, 357 U.S. 116 (1958); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, supra, and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

The importance of the right was highlighted by this Supreme Court's utilization of the "compelling state interest test" in determining the constitutional legitimacy of residency rules. *Shapiro v. Thompson*, supra; *Dunn v. Blumstein*, supra; *Memorial Hospital v. Maricopa County*, supra. Accord: *Krzewincki v. Kugler*, 338 F. Supp. 492 (N.J., 1972); *Donnelly v. City of Manchester*, 274 A. 2d 789 (N.H. Supreme Ct., 1971). The lower court applied the same standard in the instant proceeding. Petitioner contends that the Court below erred in following *Shapiro* and requiring the City to demonstrate a compelling state interest.

While we find no merit to Petitioner's argument, the constitutional standard applied is not determinative of the instant case. For Judge Lynch, who concurred in part and dissented in part to the Appellate Court opinion, employed the less exacting reasonable relationship test, urged by the City of Youngstown, and, like the majority, concluded that the rule was valid with respect to police, but was invalid with respect to Carmen Agnone.

Both the interests of the City in requiring the residency of its employees and rights of its employees to live where they choose were examined. The balance struck by the lower court was clearly proper. Though Carmen Agnone was exempted from operation of the rule, the evidence clearly established that no legitimate state purpose could or would be served by requiring him to reside within the City. The analysis and conclusion of the Appellate Court was consistent with prior holdings of this Court. What Petitioner sought, and what the lower court denied, was a blanket authorization to promulgate residency rules irrespective of personal interests affected and of governmental interests served by such a requirement. Such a holding would be clearly contrary to the prior declarations of this Court which require "at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, at 172. Of critical import to the instant cause was the City's failure to assert such a purpose, and, with respect to Carmen Agnone, the court's inability to perceive such a purpose.

3. **The Conclusion by the Court Below That the Youngstown Residency Rule Could Only Be Applied to Employees Hired Subsequent to the Passage of the Rule Was Based on a Provision of the Ohio Constitution and Is Not Properly Reviewable by This Court on a Writ of Certiorari.**

Article II, Section 28 of the Ohio Constitution provides in relevant part:

BLEED THROU

> "The General Assembly shall have no power to pass retroactive laws, or laws impairing obligation of contracts . . ."

The lower courts held that that Constitutional provision precluded application of the instant residency rule to employees hired prior to the promulgation of the rule. In so holding, the Appellate Court relied upon state precedent interpreting the Ohio Constitutional provision. The state Supreme Court denied review.

Since the issue is predicated upon the state court's application of the state constitutional law, review by this Court is clearly not merited. Indeed, the City has not asserted by its Petition that the state courts incorrectly applied state constitutional law.

After dealing with the state issues, the Appellate Court suggested that federal constitutional provisions would likewise preclude application of the residency rule to employees hired prior to the date of the passage of the rule. The court's observation would not support the granting of certiorari. As Justice Frankfurter explained in *Maryland v. Baltimore Radio Show,* 338 U.S. 912 (1950), among the grounds upon which the United States Supreme Court may deny a writ of certiorari is that

> "[t]he decision may be supportable as a matter of state law, not subject to review by this court, even though the state court also passed on issues of federal law." Id. at 918.

Since the decision rests principally upon state grounds, this Court should deny review. Principles of federalism mandate deference to state courts on state constitutional questions. The underlying reason for such deference was explained by this Court in *Younger v. Harris,* 401 U.S. 37 (1971), where this Court recognized and applied comity, and discussed its principles as follows:

> "the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country

> is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id. at 44.

To review the considered application by the Ohio courts of state constitutional law would be destructive of traditional notions of federalism and comity and contrary to the explicit mandate of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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